Tatchee Machinery Agency v Posan Timber Trading Sdn Bhd

HIGH COURT (KUALA LUMPUR) – SUIT NO C972 OF 1983
VC GEORGE J
6 NOVEMBER 1984

Civil Procedure – Judgment in default of appearance – Entering of – Defendants entered appearance after expiry of eight-day period given for such entry – Plaintiffs meanwhile presented draft judgment in default of appearance to registry – Approval of draft judgment subsequently obtained and filed – Assistant registrar signed and backdated copies to date when draft judgment was presented for approval – Whether entering of appearance by defendants came first or entering of judgment in default of appearance came first – Whether date of judgment can be backdated – Rules of the High Court 1980, O 13 r 7, O 42 r 10(2)

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In this case, the plaintiffs served a writ of summons, together with the statement of claim, on the defendants on 21 June 1983. However, it was only on 5 July 1983 that the solicitors on behalf of the defendants purported to enter an appearance. On 7 July 1983, the defendants' solicitors filed a statement of defence and counterclaim. Meanwhile, on 4 July 1983, the plaintiffs' solicitors delivered to the registry a draft certificate of non-appearance together with a draft judgment in default of appearance as the eight-day period within which the defendants had to enter an appearance expired on 28 June 1983. The plaintiffs' solicitors obtained approval of the two drafts sometime after 5 July 1983 but copies of the drafts were filed only on 14 July 1983 on which date the requisite fees were paid. The assistant registrar signed each copy but backdated them to 4 July 1983, thereby purporting to issue a certificate of non-appearance as at 4 July 1983 and purporting to enter final judgment in default of appearance. The issue before the court was which event came first, the entering of appearance or the entering of the judgment in default of appearance.

Held, setting aside the judgment in default:

(1) A distinction must be drawn between judgments or orders that are pronounced, given or made and judgments that are entered. In the case of the former, the pronouncement, giving or making of the judgment or order has to take place before the judgment or order can be drawn up. Such judgments or orders take effect from the day of its date and shall be dated on the date on which it is pronounced, given or made (O 42 r 7). In the case of the latter, the judgment to be entered has to be drawn up before it is entered (O 42 r 10(2)). Since there is no question of any pronouncement, giving or making of such judgment, and since it comes into effect on its being entered, its date has to be the date that it is entered.

(2) In the instant case, the judgment could not have been entered prior to 14 July 1983 since it was only on that date that the judgment to be entered was duly presented to the registry supported by the requisite certificate of non-appearance. The requirements of O 13 r 7 cannot be met by submitting to the proper officer a draft of the certificate. The actual certificate duly executed by the certifying authority and the judgment duly drawn up has to be presented and only then may the registrar enter the judgment. The date of the judgment will be the date that the judgment was entered and cannot be backdated. If in the meantime a defendant has entered an appearance, the default judgment sought to be entered should be rejected.

(3) On the facts, the defendants had entered their appearance prior to judgment in default having been entered. Accordingly, the judgment in default was irregularly allowed to be entered.

Legislation referred to

Rules of the High Court 1980 O 13 r 7, O 42 rr 7, 10(1), (2)

Tony Dhana for the defendants.
TS Nathan for the plaintiffs.

Cur Adv Vult

VC George J: The writ of summons with the statement of claim attached thereto was duly served on the defendant company on 21 June 1983. They had up to 28 June 1983 to enter an appearance. However, it was only on 5 July 1983 that the solicitors on behalf of the defendants purported to enter an appearance.

On 7 July 1983 the defendants' solicitors followed up the said purported entry of appearance and filed and delivered a statement of defence and counterclaim.

Now, the claim of the plaintiffs was a liquidated demand and the plaintiffs were entitled to enter final judgment against the defendants for the amount claimed and costs at any time after the time limited for appearing but before an appearance is entered. (See O 13 r 1 and O 12 r 5.) It is to be noted that a defendant may enter an appearance at any time but not after judgment has been entered except with the leave of the court.

By O 13 r 7, to enter final judgment, the plaintiffs had to produce to the proper officer at the registry a certificate of non-appearance in Form 17 and an affidavit of service of the writ. By O 42 r 10(2) the plaintiffs' solicitors were required to draw up the judgment (which by O 42 r 5 had to conform to Form 79(a)) and this had also to be presented to the proper officer at the registry. Thereupon (if the requisite fees had been paid) the proper officer at the registry, by O 42 r 10(1), was required to enter the judgment in the book kept for that purpose, file the judgment and release a duplicate thereof to the plaintiffs. In practice in Kuala Lumpur no such book is kept at the registry. What is apparently done is that an entry is made on the minute sheet of the court file to the effect that judgment had been entered.

In the instant case, on 4 July 1983 (which was one day prior to the purported entry of appearance by the defendants) the plaintiffs' solicitors delivered to the registry a draft certificate of non-appearance together with a draft judgment in default of appearance. The plaintiffs' solicitors sought approval of the two drafts which

approvals they appear to have obtained sometime after 5 July 1983. Fair copies of the approved drafts were filed only on 14 July 1983 on which date the requisite fees therefor was paid in stamps. The assistant registrar concerned thereupon signed each fair copy – each backdated to 4 July 1984 – thereby purporting to issue a certificate of non-appearance as at 4 July 1984 and purporting to enter final judgment in default of appearance.

The real question posed to the court was which came first, entering of the appearance or entering of the judgment in default. One or the other was irregularly allowed to be entered.

A distinction must be drawn between judgments or orders that are pronounced, given or made and judgments that are entered. In the case of the former the pronouncement, giving or making of the judgment or order has to take place before the judgment or order can be drawn up. Such judgments or orders take effect from the day of its date and shall be dated on the date on which it is pronounced, given or made (see O 42 r 7).

In the case of the latter the judgment to be entered has to be drawn up before it is entered (O 42 r 10(2)). Since there is no question of any pronouncement, giving or making of such a judgment and since it comes into effect on its being entered, its date has to be the date that it is entered.

In the instant case the judgment could not have been entered prior to 14 July 1983 since it was only on that date that the judgment to be entered was duly presented to the registry supported by the requisite certificate of non-appearance. The requirements of O 13 r 7 cannot be met by submitting to the proper officer a draft of the certificate. The requirement of O 42 r 10(2) cannot be met by submitting to the proper officer a draft of the order to be drawn up. The actual certificate duly executed by the certifying authority and the judgment duly drawn up has to be presented and only then may the registrar enter the judgment. The date of the judgment will be the date that the judgment was entered and cannot be backdated. If in the meantime the defendant has entered an appearance, the default judgment sought to be entered should be rejected.

In my judgment on the facts the defendants had entered their appearance prior to judgment in default having been entered. Accordingly the judgment in default which is encl 8 in the court file was irregularly allowed to be entered. It should be and is set aside.

The plaintiffs will pay the costs of and incidental to the application.

Application allowed.

Solicitors: *Zain & Co*; *Lewis & Co*.

Reported by *Ng Sheau Jiuan*

CK Tay Sdn Bhd v Eng Huat Heng Construction & Trading Sdn Bhd

HIGH COURT (JOHORE BAHRU) – ORIGINATING MOTION NO 32-2 OF 1988
ABU MANSOR J
5 OCTOBER 1988

Arbitration – Order to remit arbitrator's award back to arbitrator – Application for – Whether arbitrator failed to decide all issues referred to him – Court's discretion to remit award to be judicially exercised – Where balance of convenience lay – Merits of application

By a written agreement between the applicants and the respondents, it was agreed that C be appointed to arbitrate the numerous issues contained in the agreement. C subsequently made an award. By a notice of motion, the applicants applied that the award be remitted back to C in that he had exercised his discretion incorrectly in some of the matters referred to him for decision. The following issues were contended by the applicants: (a) C wrongly relieved the respondents of the obligation to provide a letter of indemnity despite the fact that the respondents were contractually bound to provide it; (b) C failed to decide whether or not there was any price difference resulting from the substitution of high tensile with mild steel bars; (c) C did not deal adequately on the period of delay and the quantum awarded; (d) C, by merely stating that the defects in the building will be rectified by the respondent after the other issues had been settled, had postponed the issue and not decided on it.

Held, dismissing the application:

(1) C did not relieve the respondents from having to give a letter of indemnity. The provision of a perpetual indemnity was not a term of the contract. C was correct in deciding that the letter of indemnity was not required as the consultant engineer did not object to such substitution.

(2) As to the second ground of price difference, since the applicants had not raised any objection on the substitution of mild steel bars through their consultant engineer, it was therefore no longer tenable to talk of a price difference. C was correct when he decided that there was no price difference in using the mild steel bars.

(3) As regards the third point of contention as to delay, the respondents' counsel had given reasons for C coming to such an award and the delay was explained as due to inclement weather and the applicants' alteration of the plans.

(4) On the issue of defect, this issue was a non-issue before C since the contract sum of 5% to cater for defect liability had been retained by the applicants and the complaint of defect was well after the defect liability period.

(5) Section 23 of the Arbitration Act confers a wide but limited discretion on the court to remit the award. Like all discretions, it had to be judicially exercised. Before the court can remit to the arbitrator, it had to ask what was the balance of convenience. C had not misconducted himself by failing to decide all issues referred to him and as remitting this matter to him will cause hardship to the respondents and drag this matter to no end, the balance of convenience lies in favour of the court not remitting the award back to C.

[*Editorial Note*: The applicants have appealed to the Supreme Court vide Civil Appeal No 02-4/89.]